SUPREME COURT, U. S.

FILED
APR 17 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974
No. 74-1307

JOHN BOWMAN, HAROLD TAYLOR,
and RAY MICHAEL BOUDREAUX,

Petitioners,

vs.

PRESIDING JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES AND JURY COMMISSIONER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Richard S. Buckley,
Public Defender of Los Angeles
County, California

Harold E. Shabo,
Michael Rothschild,
Gerald Chaleff,
Deputy Public Defenders

311 South Spring Street
Suite 600
Los Angeles, California 90013
Telephone: (213) 974-2883

Attorneys for Petitioner
John Bowman

Neil M. Herring,
Elnora Beth Livezey,

619 South Bonnie Brae
Los Angeles, California 90057
Telephone: (213) 484-8280

Attorneys for Petitioner
Harold Taylor

Carol K. Smith

2212 Sunset Boulevard
Los Angeles, California 90026
Telephone: (213) 413-4430

Attorney for Petitioner
Ray Michael Boudreaux

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

JOHN BOWMAN, HAROLD TAYLOR,
and RAY MICHAEL BOUDREAUX,

Petitioners,

vs.

PRESIDING JUDGE OF THE SUPERIOR
COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES AND
JURY COMMISSIONER OF THE SUPERIOR
COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	4
STATEMENT OF THE CASE:	
A. HISTORY OF THE CASE . . .	5
B. HOW THE FEDERAL QUESTION AROSE	6
C. STATEMENT OF FACTS	8
REASONS FOR GRANTING THE WRIT:	
I. Intervention by this Court is proper.	11
II. Voter registration lists per se do not reflect a cross section of the community as demonstrated by the uncontroverted evidence. . .	15
III. Petitioners have been deprived of due process of law	20
CONCLUSION	26

INDEX

	Page
APPENDIX A - Order Granting Writ of Mandate	A-1
APPENDIX B - Order Denying Hearing after Judgment by the Court of Appeal	A-5
APPENDIX C - Letter from Los Angeles County Public Defender dated February 27, 1975, to Office of the Secretary of State, State of California	A-7
Letter from Office of the Secretary of State, State of California, dated March 5, 1975, to Office of the Los Angeles County Public Defender. . . .	A-9

TABLE OF AUTHORITIES

Page

Cases:

Braden v. 30th Judicial Circuit Court of Kentucky (1973) 410 U.S. 484 12,13

Brinkerhoff-Farris Trust and Savings Co. v. Hill (1930) 281 U.S. 673 22

Chaucey v. Second Judicial District Court, Reno, Nevada (1971) 453 F.2d 389 12,13

Douglas v. California (1963) 372 U.S. 353 22

Gibson v. Berryhill (1973) 411 U.S. 564 13

Glasser v. United States (1942) 315 U.S. 60. 17

Halliday v. United States (1969) 394 U.S. 831 14

In re Stewart (1974) 10 Cal.3d 902. 14

In re Yurko (1974) 10 Cal.3d 857. 14

People v. Hitch (1974) 12 Cal.3d 641. 14

TABLE OF AUTHORITIES

Page

Cases:

People v. Medina (1972)
6 Cal.3d 484 15

Peters v. Kiff (1972)
407 U.S. 493 8,21,22

Ross v. Moffitt (1974)
___ U.S. ___, 94
S.Ct. 2437 22,23,24

Steffel v. Thompson (1973)
415 U.S. 452 13

Stovall v. Denno (1967)
388 U.S. 293 14

Taylor v. Louisiana (1975)
___ U.S. ___, 95
S.Ct. 692 . . . . . 13,16, 18,19,24

Westbrook v. Mihaly (1970)
2 Cal.3d 765 14

Younger v. Harris (1971)
401 U.S. 37 12

TABLE OF AUTHORITIES

	Page
Constitutional and Statutory Provisions:	
United States Constitution, Amendment VI	3,4,6, 7,11,20
Amendment XIV.	3,4,6, 7,11,20, 22,23,24,25
28 U.S.C. section 1257(3) . .	3
Los Angeles Superior Court, Rule 25, section 2	4,5,8,18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No.

JOHN BOWMAN, HAROLD TAYLOR,
and RAY MICHAEL BOUDREAUX, Petitioners,

v.

PRESIDING JUDGE OF THE SUPERIOR
COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES AND
JURY COMMISSIONER OF THE SUPERIOR
COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

Petitioners, John Bowman, Harold Taylor, and Ray Michael Boudreaux respectfully pray that a writ of certiorari issue to review the order of the Court of Appeal of the State of California, Second Appellate District, Division Four, in the above cause entered on November 28, 1974.

OPINION BELOW

The Court of Appeal of the State of California, Second Appellate District, Division Four, issued an unreported order granting a peremptory writ of mandate, printed in Appendix A. The Supreme Court of California denied a hearing and said order is printed in Appendix B.

JURISDICTION

The order of the Court of Appeal of the State of California, Second Appellate District, Division Four, was entered on November 28, 1974. A timely petition for rehearing was denied on December 17, 1974, a timely petition for hearing was denied by the Supreme Court of California on January 23, 1975, and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED

1. Does reliance upon voter registration as the sole source of criminal trial jurors violate the right to an "impartial jury of the State" guaranteed by the Sixth Amendment and the right to due process and equal protection as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America when the resulting venire does not represent a fair cross section of the community in that poor persons are under represented by 66-2/3% in relation to their population and poor persons of minority racial groups are virtually excluded therefrom?

2. Does setting aside a trial court's order by an appellate court without hearing and without providing real parties in interest an opportunity to be heard, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution when real parties in interest had indicated a desire to be heard and alleged that the party moving in the appellate court had

misstated the law to, and withheld determinative evidence from, that court?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth and Fourteenth Amendments to the United States Constitution.

> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."
>
> Amendment XIV: ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Los Angeles Superior Court, Rule 25, section 2: "The names of prospective jurors shall be taken from the last published and available registered voters' list of Los Angeles County through the use

of automated random selection. . . ."

STATEMENT OF THE CASE

A. HISTORY OF THE CASE

On October 11, 1974 a judge of the Superior Court for Los Angeles County, California, granted petitioners' motion to quash the jury venire selected pursuant to Local Rule 25 and directed the jury commissioner to provide a panel of jurors selected by a method which ensured the opportunity for full participation of all cognizable groups in the community.

On November 8, 1974, respondents filed a Petition for Writ of Mandate in the Court of Appeal of the State of California.

On November 13, 1974, petitioners filed a Declaration and Request for Extension of Time Within Which to File Points and Authorities in Opposition to the Petition for Writ of Mandate. Petitioners therein alleged that whereas respondents' statement of fact in the Court of Appeal was a little over one page long, the record before the trial judge was in excess of 250 pages of transcript and 65 pages of technical exhibits, that respondents had

withheld all of said exhibits and a significant portion of said transcript from the Court of Appeal, that petitioners intended to prepare a complete statement of fact and brief in opposition to respondents and therefore an additional sixty days was requested within which to file said brief.

Petitioners received no response from the Court of Appeal concerning their request. Without notice or hearing, on November 26, 1974 the Court of Appeal granted a peremptory writ of mandate.

A timely petition for rehearing was denied by the Court of Appeal on December 17, 1974 and a timely petition for hearing was denied by the California Supreme Court on January 23, 1975.

B. HOW THE FEDERAL QUESTION AROSE

Moving papers submitted by petitioners in support of their motion to quash the jury venire in the Superior Court of Los Angeles County invoked the Sixth Amendment and the Equal Protection and Due Process Clauses of the United States Constitution. Although the superior court's order granting

petitioners' motion expressly invoked the Equal Protection Clause of the Fourteenth Amendment, the memorandum of decision in support of said order also incorporated the Sixth Amendment and Due Process Clause of the Fourteenth Amendment to the United States Constitution.

After the California Court of Appeal issued its peremptory writ of mandate commanding the Los Angeles Superior Court to set aside its order granting petitioners' motion, petitioners alleged both in the petition for rehearing in the Court of Appeal and subsequently the petition for hearing in the California Supreme Court, that:

(a) The Sixth and Fourteenth Amendments to the United States Constitution impose an affirmative duty to provide a jury panel representative of the community. Where substantial underrepresentation is found, as in the case at bench, the process of selection is presumptively unlawful. No compelling state interest has been shown to justify

said underrepresentation herein.

(b) The California Court of Appeal deprived petitioners of the right to be heard in clear contravention of the judicial policy favoring review of the jury selection process stated by this Court in Peters v. Kiff (1972) 407 U.S. 493 at 505. (Peters v. Kiff was cited for this proposition only in the petition for hearing before the California Supreme Court.)

C. STATEMENT OF FACTS

Pursuant to Local Court Rule 25, the petit jury venire of the Superior Court of Los Angeles County, California, is chosen exclusively by random selection of names from lists of registered voters.

In an effort to ascertain whether it represented a fair cross section of the community, a study was conducted in 1972 and 1973 of the venire's demographic characteristics. For accuracy of comparison, characteristics documented in the United States Census were studied and the

census definition of poverty--family income less than $5,000--was adopted. Thirteen comparisons with census figures for Los Angeles County resulted, including as a partial example:

Annual Family Income Less Than $5,000:	
Impaneled Juror Families	5.4%
Los Angeles County Families as a whole	15.9%
Monthly Rental Less Than $80:	
Impaneled Juror Families	5.2%
Los Angeles County Families as a whole	24.2%
Percentage Not Finishing High School: (25 years and older)	
Impaneled Jurors	9.8%
Los Angeles County as a whole	38%

The study also revealed that of the poor serving on the Los Angeles petit jury, only 5.5% were Blacks and 7.3% Latins whereas census figures indicated that 18.3% of the poor in Los Angeles are Blacks and 21.7% Latin. These findings were cross-evaluated and verified.

The foregoing evidence was presented at a hearing in the Superior Court for

Los Angeles County in support of petitioners' motion to quash the venire.

Additional evidence of an unrelated study comparing the general population with registered voters within the same census tracts was presented. This study revealed the three poorest tenths of Los Angeles County to be underrepresented on voter registration lists by 31.18%, 25.40% and 32.59% respectively. The wealthiest tenth was overrepresented by 34.45%.

Two sociologists indicated in great detail the set pattern of responses and attitudes which uniquely characterize the poor because of a divergent life experience. The divergence was shown not only to establish the poor as a cognizable group, but to result in the easily mistaken disbelief of a poor witness by a nonpoor juror in that poor persons accept as the norm that which may be unusual and unacceptable to the nonpoor. Both enjoy a unique psychological outlook.

Expert testimony also established that Black persons constitute a cognizable group, have undergone life experiences dissimilar to those of other Americans

and speak a form of "language" which non-black jurors may erroneously deem ignorant and uneducated. In many instances, such a juror would be incapable of comprehending the experience related by a poor, Black witness.

None of the foregoing evidence was rebutted. The Superior Court for Los Angeles County granted petitioners' motion to quash the jury venire. It held that exclusive reliance upon voter registration lists on the facts shown deprived petitioners--all of whom are young, poor, and Black--of equal protection of the law, due process of law and the right to a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. The superior court directed the Jury Commissioner to select a jury panel which represented a fair cross section of the community, including the poor.

REASONS FOR GRANTING THE WRIT

I. INTERVENTION BY THIS COURT IS PROPER.

This court may not enjoin pending state prosecutions except under extraordinary

circumstances where the injury confronting the petitioner is great, immediate and irreparable (Younger v. Harris [1971] 401 U.S. 37). Petitioners present such a case.

In contrast to a criminal defendant who wishes to abort state proceedings, intervention is proper when a petitioner demands enforcement of a constitutional right basic to a fair trial, even though that trial may be pending. Federal intervention is appropriate since the constitutional right in question affects the petitioner's then-present circumstances and his ability to secure a trial which comports with constitutional mandates (Braden v. 30th Judicial Circuit Court of Kentucky [1973] 410 U.S. 484, 490-1; Chaucey v. Second Judicial District Court, Reno, Nevada [1971] 453 F.2d 389, 390, fn. 1).

Similar to the constitutionally guaranteed right to speedy trial enforced in Braden, supra, and Chaucey, supra, petitioners herein do not seek to abort or enjoin state proceedings but rather seek to enforce their right to that trial by

an impartial jury selected from a fair cross section of the community (Taylor v. Louisiana [1975] ____ U.S. ____; 95 S.Ct. 692).

As in Braden and Chaucey, petitioners herein have presented their claim in every level of the state judicial system and have been denied by all. Because the nature of the right invoked herein affects the fact finding process itself, only a remedy prior to the inception of that process will suffice (cf. Gibson v. Berryhill [1973] 411 U.S. 564, 578).

Basic to this Court's doctrine of non-intervention is recognition that due to principles of equity, comity and federalism, a federal court must not act where state courts will provide a petitioner the necessary vehicle for vindicating his constitutional rights (see Steffel v. Thompson [1973] 415 U.S. 452, 460-1). No such vehicle is available to petitioners.

Asking petitioners to suffer trial by a constitutionally defective jury and waiting for them to reassert their federal claim in California courts would be an exercise in futility. California

courts rely upon the rule challenged herein almost exclusively and a different rule would have an overwhelming effect on the administration of justice if not limited to prospective application (see Halliday v. United States [1969] 394 U.S. 831; In re Yurko [1974] 10 Cal.3d 857, 865). Because California does not follow the approach adopted by this Court of applying such a rule to the aggrieved party responsible for bringing the issue to judicial attention and thereafter prospectively (Stovall v. Denno [1967] 388 U.S. 293, 301), but rather to future litigants only (see, e.g. In re Stewart [1974] 10 Cal.3d 902; In re Yurko [1974] 10 Cal.3d 857; People v. Hitch [1974] 12 Cal.3d 641), petitioners' right to a jury selected from a fair cross section of the community will be forever lost if not granted at this juncture (see dissenting opinion of Mosk, J. and Peters, J.: Westbrook v. Mihaly [1970] 2 Cal.3d 765, 802).

Even absent the foregoing considerations, the Court of Appeal Order printed in Appendix A hereto appears on its face

to constitute a written opinion with reasons stated, is therefore res judicata with reference to the issues therein and therefore bars litigation of the question on appeal (see People v. Medina [1972] 6 Cal.3d 484). For this further reason, California courts do not provide a vehicle for vindicating petitioners' rights pursuant to the United States Constitution.

II. VOTER REGISTRATION LISTS PER SE DO NOT REFLECT A CROSS SECTION OF THE COMMUNITY AS DEMONSTRATED BY THE UNCONTROVERTED EVIDENCE.

When considered in light of the uncontroverted evidence before the trial court, the order of the California Court of Appeal herein creates a conclusive presumption that this Court's requirement that a criminal jury be chosen from a fair cross section of the community is met whenever a local judicial district relies exclusively upon voter registration lists as the source of trial jurors. To allow the decision below to stand is to permit blind application of a mechanical

standard, without regard for evidentiary fact, when measuring a jury venire against the standards of the Constitution.

This case presents the same considerations which this Court evaluated in Taylor v. Louisiana (1975) ____ U.S. ____, 95 S.Ct. 692:

> ". . . selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." (____ U.S. ____, ____, 95 S.Ct. 692, 697.)

The study of the Los Angeles County Superior Court venire in the case at bench did not sample a mere portion of that venire but interviewed every person serving in the central district during a given five week period. Poor persons were found to comprise 5.4% of those jurors whereas they comprised 15.9% of the population in Los Angeles County as a whole. The poor were therefore underrepresented by 66-2/3% on the venire. Absence of poor from the venire excludes from jury deliberation the common sense

judgments and distinct experience and perceptions of a large part of the Los Angeles community.

Voter registration lists, the exclusive source of the Los Angeles venire, were also studied and were found to grossly underrepresent the poor and overrepresent the affluent. Exclusive reliance upon such a lopsided source results in systematic overrepresentation of the affluent, rendering the resultant jury an exclusive organ of the economically and socially privileged. Such a selection procedure is abhorrent to the fundamental values of a democratic society, values embodied in the Constitution and recognized by this Court. The jury must "be a body truly representative of the community . . . and not the organ of any special class or group"(Glasser v. United States [1942] 315 U.S. 60, 86).

Unquestioning reliance exclusively upon voter registration as a source of jurors fails to pass constitutional muster for the further reason that such lists vary over time in relation to the population for reasons totally inapplicable to

juror qualification.

> "What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place." (Taylor v. Louisiana, supra, ____ U.S. ____, ____, 95 S.Ct. 692, 701.)

California law does not require registration to vote as a prerequisite to jury service, although the Local Rule of Court challenged herein achieves that result. Because of voter apathy in the last statewide election alone, over 3.5 million persons were deleted from voter registration rolls in California because of their failure to exercise the franchise.[1/] It is established that it is the poor and minorities who fail to exercise the franchise to a greater degree than the affluent, older majority. Current voter registration lists therefore distort the

---

1/ Correspondence between the office of the Los Angeles County Public Defender and the office of the Secretary of State for the State of California verifying this information is printed in Appendix C hereto.

fair cross section concept to even a greater degree than those involved in the case at bench.

Petitioners do not seek a jury of any particular composition, but rather a jury selected from a venire which provides the opportunity for service to all cognizable groups in the community.

> ". . . the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." (Taylor v. Louisiana, supra, ____ U.S. ____, ____, 95 S.Ct. 692, 702.)

The case at bench reveals that in the most populous county of the most populous state in the nation the poor uniformly do not register to vote whereas the converse is true of the affluent. There is reason to suspect this fact is true nationwide.

Petitioners have made a conclusive unrebutted showing that in Los Angeles County the voter registration lists from

which the jury venire in the instant case was selected systematically underrepresent the poor, particularly poor Black persons. That said selection process is justified by a compelling state interest has not been and cannot be shown by the state. Under the uncontroverted evidence presented by petitioners and accepted by the trial court, the state's use of such lists violates the Sixth and Fourteenth Amendments to the United States Constitution.

III. PETITIONERS HAVE BEEN DEPRIVED OF DUE PROCESS OF LAW.

The petition filed with the California Court of Appeal by respondents herein contained blatant misrepresentations of fact and law. Petitioners attempted in the only available method to call that court's attention to the fact that all evidence before the trial court had not been presented to it and requested an opportunity to brief those facts and the relevant law prior to any action by the court.

Issues presented by the instant case are of overriding public importance and

properly are subject for, at the very least, a full hearing. As recognized by this Court in Peters v. Kiff (1972) 407 U.S. 493, when any significant cognizable group is underrepresented in jury service,

> ". . . the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknowable . . . [and therefore] deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." (407 U.S. 493, 504-505.)

By its order, the California Court of Appeal sought to justify its issuance of a peremptory writ without permitting petitioners the opportunity even to brief the matter on the tenuous ground of "serious administrative problems" and the "uncertainty" over the jury selection process. This reasoning is clearly contrary to this Court's policy favoring review of the jury selection process, as

exemplified by the case at bench (see Peters v. Kiff, supra, 407 U.S. 493, 505).

Petitioners asserted and the Los Angeles County Superior Court found an invasion of their substantive rights under the United States Constitution. That court did not make its finding lightly; it acted on the basis of an extensive, uncontroverted evidentiary hearing. The Due Process Clause of the Fourteenth Amendment to the United States Constitution bars a contrary ruling on that record, absent an opportunity by all parties fully to brief relevant facts, and applicable law (cf. Brinkerhoff-Farris Trust and Savings Co. v. Hill [1930] 281 U.S. 673, 677-679). State appellate procedures must conform to federal standards of Due Process and Equal Protection (Douglas v. California [1963] 372 U.S. 353).

In Ross v. Moffitt (1974) ____ U.S. ____, 94 S.Ct. 2437 this Court held that Due Process does not require that the State appoint counsel for a convicted person for the purpose of representing him on a

discretionary appeal. This Court reasoned, however, that because the State initiates a criminal proceeding Due Process requires the appointment of counsel for the accused at trial in order to insure the integrity of the fact-finding process. In reaching its conclusion this Court stated that on appeal it is ordinarily the defendant, rather than the State, who initiates the appellate process in order to overturn the findings of the trial judge or jury. (____ U.S. at ____, 94 S.Ct. at 2444.)

The Court's rationale in Ross applies equally to petitioners' right to be heard in the case at bench. Petitioners prevailed in the trial court, which found that the use of voter registration lists as the exclusive source of jury selection will not conform to the fair cross-section requirement of the Constitution. In order to overturn this wholly supported finding of the trial court, the State initiated the appellate process and "haled" petitioners into appellate court. (Cf. Ross v. Moffitt, supra.) Petitioners thus were, for purposes of Due Process, in the

analogous position of the State vis-á-vis the accused on appeal. Having prevailed below, as an incident to protecting their Due Process presumption of innocence and to secure a constitutionally compatible jury selection system for trial, petitioners were entitled to be afforded the opportunity to be heard on appeal.

Just as the State may not dispense with the fact-finding stage of proceedings under Ross v. Moffitt, supra, it must guarantee trial juries be drawn from a venire which does not systematically exclude distinctive groups in the community and therefore fail to be reasonably representative thereof (Taylor v. Louisiana [1975] ____ U.S. ____, 95 S.Ct. 692). The Superior Court for Los Angeles County determined that a trial jury which comports with that mandate cannot be selected exclusively from voter registration lists. Petitioners therefore cannot be deprived of that guarantee as applied to them by the Superior Court for Los Angeles County absent the due process requirements of an opportunity to be heard. The action of the California

Court of Appeal was in violation of the Fourteenth Amendment to the United States Constitution, a violation magnified by the fact it deprived petitioners of their final right to a full adversary hearing.[2/]

//
//
//
//
//
//
//
//
//
//
//
//
//
//
//
//
//
//
//
//

2/ There is no absolute right to hearing by the California Supreme Court and, as indicated in topic II, supra, a post-trial appeal will not vindicate the deprivation of rights in question herein.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the Court of Appeal of the State of California, Second Appellate District, Division Four.

Respectfully submitted,

Richard S. Buckley,
Public Defender of Los Angeles County, California
Harold E. Shabo,
Michael Rothschild,
Gerald Chaleff,
Deputy Public Defenders
311 South Spring Street
Suite 600
Los Angeles, California 90013

Attorney for
Petitioner John Bowman

Neil M. Herring,
Elnora Beth Livezey,
619 South Bonnie Brae
Los Angeles, California 90057

Attorneys for
Petitioner Harold Taylor

Carol K. Smith,
2212 Sunset Boulevard
Los Angeles, California 90026

Attorney for
Petitioner Ray Michael Boudreaux

April 18, 1975

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ALFRED J. McCOURTNEY and WILLIAM A. GOODWIN, Petitioners, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent, HAROLD TAYLOR, JOHN BOWMAN and RAY MICHAEL BOUDREAUX, Real Parties in Interest.	Civil No. 45230 ORDER GRANTING WRIT OF MANDATE

THE COURT:

On October 11, 1974, one of the judges of the superior court, in his capacity as trial judge in a criminal case duly assigned to him (People v. Taylor, Bowman and Boudreaux, No. A 277425) made an

order declaring that the method regularly employed by the court in selecting a jury panel was unlawful and unconstitutional, and directing the jury commissioner to select a jury in some other way. The presiding judge of the superior court has now applied to this court for an order requiring the superior court to set aside the aforesaid order of October 11, 1974.

The present system for making up the jury panel by random selection from voter registration lists was established by a rule of court (rule 25) which was adopted by a majority of the judges of that court pursuant to Code of Civil Procedure section 204b. The method required by this rule has been held to be proper by all of the appellate courts which have considered the subject. For the recent examples, see People v. Powell, 40 Cal.App.3d 107, 124, and Adams v. Superior Court, 27 Cal.App.3d 719. See also People v. Sirhan, 7 Cal.3d 710, 749.

The order made by one judge of the Los Angeles Superior Court, requiring a procedure different from that which is

prescribed by the court rules, creates serious administrative problems. The pendency of this proceeding, brought to review the October 11, 1974, order, casts uncertainty over the jury selection process in every case in this county. That uncertainty cannot be resolved until a judgment of a reviewing court becomes final. A prompt disposition of this matter in this court is indicated.

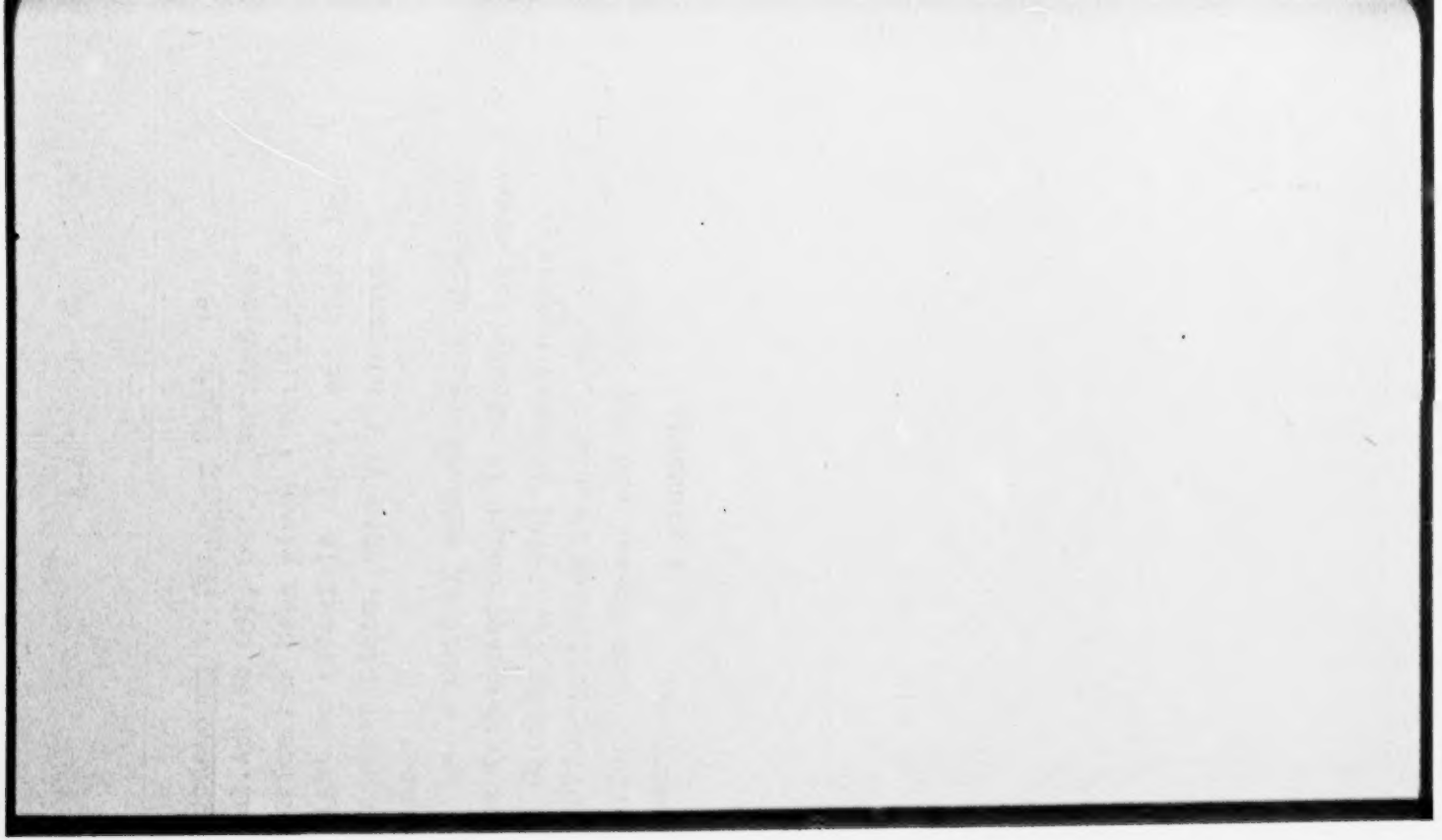
An intermediate appellate court is bound to respect established law and will not hand down a decision conflicting with the decision of other appellate courts of this state except for the most compelling reasons.

The reasons for making the October 11, 1974, order are fully set forth in the trial judge's opinion which accompanied it. We do not find those reasons to be sufficient ground for overturning the existing case law which other courts are and have been following.

Code of Civil Procedure section 1088 provides that when an application is made upon due notice, the peremptory writ may be issued in the first instance. (See

Goodenough v. Superior Court, 18 Cal.App.3d 692, 697.) We find due notice has been given. Petitioners' right to relief is clear, and there is no other plain, speedy or adequate remedy.

Let a writ of mandate issue directing the respondent court to vacate the order of October 11, 1974. in case number A 277425 entitled People v. Harold Taylor, John Bowman and Ray Michael Boudreaux.



ORDER DENYING HEARING
AFTER JUDGMENT BY THE
COURT OF APPEAL

2nd District, Division 4, Civil No. 45230

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

McCOURTNEY ET AL., PETITIONERS

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
RESPONDENT;

TAYLOR ET AL., REAL PARTIES IN INTEREST.

Petitions of respondents and real parties in interest for hearing DENIED.

Tobriner, J., and Mosk, J., are of the opinion that the petitions should be granted.

SUPREME COURT
FILED
JAN 23 1975
G.E. BISHEL, Clerk

_____
Deputy

WRIGHT

_____
Chief Justice

APPENDIX C

COUNTY OF LOS ANGELES
OFFICE OF THE PUBLIC DEFENDER
311 SOUTH SPRING ST., ROOM 600
LOS ANGELES, CALIFORNIA 90013
TELEPHONE 974-2884

February 27, 1975

Mrs. Gayla Barker
Office of the Secretary of State
111 Capitol Mall
Sacramento, California 95814

Re: Statewide Voter Registration Statistics

Dear Mrs. Barker:

I believe you are the lady with whom I spoke on the telephone almost a month ago with reference to the press release of your office indicating that more than 3.5 million Californians have been dropped from voter registration rolls. At that time you indicated you would send me, by letter, a full summary of these statistics and any internal breakdown your office may have with reference thereto.

Perhaps this matter has slipped your mind since the letter has not yet been received. This information remains important and it is necessary that your press release be substantiated by something more than a newspaper clipping for purposes of this office.

Your consideration with reference to this matter will be sincerely appreciated.

Very truly yours,

s/Michael Rothschild

MICHAEL ROTHSCHILD
Deputy Public Defender
Appellate Division

MR:sn

OFFICE OF THE SECRETARY OF STATE

MARCH FONG EU

111 CAPITOL MALL

SACRAMENTO, CALIFORNIA 95814

March 5, 1975

Mr. Michael Rothschild
Deputy Public Defender
311 South Spring Street
Los Angeles, California 90013

Dear Mr. Rothschild:

We do not know how many people were purged; but we do know that in examination of the Report of Registration for the thirty day close and the Report of Registration after the purge shows that the following shows the difference between the two reports is:

	October 1974	January 1975	Difference
Democratic	5,623,831	3,616,589	2,007,242
Republican	3,574,624	2,464,569	1,110,055
American Independent	40,220	21,768	18,452
Peace and Freedom	40,584	12,851	27,733

	October 1974	January 1975	Difference
Miscellaneous	33,454	13,339	20,115
Declined to State	615,651	282,137	333,514

We know from the Statement of Vote that 6,370,731 people actually voted and the difference amounts to less than one per cent error of 40,717 may be ascribed to several factors:

1. The October Report of Registration as reported by the counties to our office may not have been final. The counties may have added or deleted a small number of people after their report to us and prior to or after the election.
2. Anybody who registered to vote after October 6, 1974, but prior to the purge, would probably be included in the January 1, 1975, report.
3. Some counties may have included people who had been purged but whose card had been restored.

We asked the counties at the time that they reported the Statement of Vote to tell us how many Democratic, Republican,

American Independent, and Peace and Freedom actually voted. The counties were unable to supply us with this information.

It should be remembered that the January 1, 1975, figures only closely approximate the purge. In this instance the percentage of error is .64 per cent.

If I can be of any further assistance, please write or call.

Sincerely,

s/Edward Arnold Jr.

Edward Arnold Jr.
Chief of Elections Division

EA:gb

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.
FILED
MAY 17 1975
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term 1974

No. 74-1307

JOHN BOWMAN, HAROLD TAYLOR, and RAY MICHAEL BOUDREAUX,
Petitioners,

vs.

PRESIDING JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES AND JURY COMMISSIONER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondents.

On a Petition for a Writ of Certiorari
Directed to the Court of Appeal of the State of California

BRIEF OF RESPONDENTS IN OPPOSITION

JOHN H. LARSON, County Counsel
JOHN P. FARRELL, Deputy County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1886
Attorneys for Respondents.

WESTERN PRINTING COMPANY, WHITTIER—698-1722

TOPICAL INDEX

page

I Questions Presented 2

II Statement of Case 2

III The Sole Selection of Jurors From Voter Registration Lists Is Constitutional In The Absence of Systematic and Purposeful Exclusion of Cognizable Groups 4

IV The Poor Are Not A Cognizable Group Systematically Excluded from Jury Service 9

V No Federal Question Is Presented By The Issuance Of The Peremptory Writ Of Mandate By The California Court Of Appeal 12

VI Conclusion 13

TABLE OF CASES AND AUTHORITIES CITED

Cases

page

Adams v. Superior Court (2d Dist. 1972) 27 Cal. App.3d 719 ..... 9, 13

Bradley v. Judges (C.D. Cal. 1974) 372 F.Supp. 26 9

Camp v. United States (5th Cir. 1969) 413 F.2d 419, cert. den. 396 U.S. 968 ..... 10, 11

Gorin v. United States (1 Cir. 1963) 313 F.2d 642 10

Page

Hamling v. United States (1974) .....U.S. ....., 41 L.Ed.2d 590 .....6, 7, 8, 13
People v. Powell (2d Dist. 1974) 40 Cal.App.3d 107..13
People v. Sirhan (1972) 7 Cal.3d 710 13
People v. Taylor, No. A277425 .....3, 4, 5
Thiel v. Southern Pac. Co. (1946) 328 U.S. 217, 90 L.Ed. 1181 6
United States v. Bennett (9th Cir. 1971) 445 F.2d 638, cert den. 404 U.S. 1023 .....8, 11
United States v. Caci (2 Cir. 1968) 401 F.2d 664..... 10
United States v. Kelly (2d Cir. 1965) 349 F.2d 720, 778 10
United States v. Ross (9th Cir. 1972) 468 F.2d 1213, cert. den. 410 U.S. 989 11

Authorities

page

Code of Civil Procedure
Section 200 10
Section 202 10
Section 204d 2
Section 204b 2
Section 255 2
Section 1088 12

Election Code Sections 201 and 219 5

28 U.S.C. §1863 (b)(2) 11

IN THE

Supreme Court of the United States

October Term 1974

No.....

JOHN BOWMAN, HAROLD TAYLOR,
and RAY MICHAEL BOUDREAUX,
Petitioners,

vs.

PRESIDING JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES AND JURY COMMISSIONER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents, Presiding Judge of the Superior Court of the State of California for the County of Los Angeles and the Jury Commissioner of the Superior Court of the State of California for the County of Los Angeles, oppose the issuance of the Writ of Certiorari petitioned for in this case on grounds stated herein.

I

QUESTIONS PRESENTED

1. Does the selection of jurors by random method solely from the current list of registered voters, in the absence of any intention or purpose to discriminate or any systematic exclusion, raise a substantial federal question where the resulting jury panel may contain a disproportionately low number of poor persons?

2. Is there any federally protected right to a hearing in a state appellate court before such court can grant a writ upon a noticed petition served on the parties?

II

STATEMENT OF CASE

Annually in accordance with state law (Code of Civil Procedure Section 204d) a majority of the approximately 160 judges of the Superior Court of the State of California for the County of Los Angeles certify a panel of trial jurors for the ensuing year. Pursuant to state statutes (Code of Civil Procedure Sections 204b and 255), a majority of such judges have established a court rule governing the procedures for selecting jurors, which provides as follows:

> "The names of prospective trial jurors shall be taken from the last published and available registered voters' list of Los Angeles County through the use of automated random selection." Local Rule 25.

The 1970 census showed that Los Angeles County had a population of 7,032,075 persons of whom 4,772,-057 were eighteen years of age or older. The September 1974 list of registered voters for the County of Los Angeles contained approximately 3.2 million names. In a typical year (1972), 200,000 questionnaires were sent to names randomly selected from the voters' list. About three-quarters of these persons failed to respond or were excused, resulting in about 55,000 persons being certified for jury service in the ensuing year for the nine judicial districts of Los Angeles County.

The list of jurors to serve in 1974 was similarly selected, screened, and certified by a majority of the judges. However, on October 11, 1974, a single judge granted a pre-trial motion of petitioners (defendants below) in the case of *People* v. *Taylor,* No. A277425 to quash the jury venire for the Central District of the County (comprising a population of about 1,500,000 persons) and ordered the jury commissioner to provide a panel not chosen solely from the voters' registration list and which would represent (impliedly proportionately) "a fair cross-section of all segments of the community, including the poor."

On November 8, 1974, respondents, the presiding judge and the jury commissioner of the county, filed a petition for writ of mandate with the California Court of Appeal and served copies on the petitioners herein. That petition alleged that:

1. The selection of jurors from the list of regis-

tered voters in the absence of systematic and intentional exclusion of cognizable groups was constitutional;

2. A single judge may not order a jury panel to be furnished other than that certified by a majority of the judges;
3. The poor are not a cognizable class for this purpose; and
4. The facts did not support the order.

On November 26, 1974, the Court of Appeal granted without hearing a peremptory writ of mandate ordering the trial judge to vacate his order.

Petitioners herein filed a petition for rehearing in the Court of Appeal, which was summarily denied. Petitioners then filed a petition for hearing in the California Supreme Court which was also summarily denied. Petitioners now seek review of the final order of the Court of Appeal granting the writ of mandate.

III

THE SOLE SELECTION OF JURORS FROM VOTER REGISTRATION LISTS IS CONSTITUTIONAL IN THE ABSENCE OF SYSTEMATIC AND PURPOSEFUL EXCLUSION OF COGNIZABLE GROUPS

The massive jury selection required for the County of Los Angeles is conducted in a manner free from purpose or motive of bias, as even trial judge's order in *People* v. *Taylor, supra,* admits.

> "There is no contention that the Superior Court ever intentionally maintained the registration list as an exclusive means of selecting jurors for the purpose of diluting representation of the group or groups of people to which the defendants belong."
>
> *People v. Taylor, supra,* Order of October 14, 1974[1] p. 3

The sophisticated, computer age, automated random selection of jurors from the voter registration lists rules out even the possibility of individual bias on the part of the jury commissioner or his staff. Moreover, California law encourages the registration of persons to vote and bars any form of voter registration fee. Elections Code Sections 201 and 219. For each of Los Angeles County's more than 4,000 election precincts a position of deputy registrar of voters is authorized, to be paid at the rate of $0.35 per person registered. Los Angeles County Ordinance No. 6222.

The trial court found no intention to exclude any group, but believed that the system of exclusively using voter registration lists resulted in a disproportionately low number of poor persons serving as jurors. The trial judge felt that the de facto disproportion of poor persons was unconstitutional. However, this Court has long held that a jury panel will not be held constitutionally infirm in the absence of systematic *and* intentional (or purposeful) exclusion of cognizable groups. This Court has said:

[1]Hereinafter referred to as the Order.

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. [citations omitted] This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does not mean that propective jurors shall be selected by court officials without *systematic and intentional exclusion* of any of these groups."

Thiel v. Southern Pac. Co. (1946) 328 U.S. 217, 220, 90 L.Ed. 1181.

In June of last year this Court again dealt with this question. The Court confronted a challenge to the jury panel of the federal district court for the Southern District of California which was drawn solely from the voter registration list and which was updated only every four years, providing a panel in the fourth year with no persons under 24 years old. The Court summarized the petitioners' claim as follows:

"Petitioners' second procedural contention is that the trial jury was improperly constituted because an allegedly cognizable class of citizens, 'young adults', which petitioners define as those between the ages of 18 and 24 years, were systematically excluded."

Hamling v. United States (1974) ..... U.S. ....., 41 L.Ed.2d 590, 631.

Even though it was clear that the current panel *absolutely* excluded every person under 24 years of age, the Court agreed that there was no evidence of a purposeful, systematic exclusion of the purported class.

> "The Court of Appeals assumed, without deciding, that the young do constitute a cognizable group or class, but concluded that petitioners had 'failed to show, let alone establish, a *purposeful, systematic exclusion* of the members of that class whose names, but for such systematic exclusion would otherwise be selected for the master jury wheel; and therefore, that the District Court's refusal to grant a continuance was not an abuse of discretion.' 481 F.2d, at 314. We agree with the Court of Appeals."
>
> *Hamling, supra,* 41 L.Ed.2d at 632. (Emphasis added.)

The mere *de facto* exclusion of a certain age group was viewed as insufficient to establish even a *prima facie* case of unconstitutional discrimination in jury selection. Clearly, the standard of "purposeful, systematic exclusion" carries with it a requirement of purpose to discriminate.

> "Assuming as did the Court of Appeals, that the young are such a group, we do not believe that there is evidence in this case sufficient to make out a prima facie case of discrimination which would in turn place the burden on the Government to overcome it."
>
> *Hamling, supra,* 41 L.Ed.2d at 632.

"But if the jury wheel is not discriminatory when completely updated at the time of each refilling, a prohibited 'purposeful discrimination' does not arise near the end of the period simply because the young and other persons have belatedly become eligible for jury service by becoming registered voters."

Hamling, supra, 41 L.Ed.2d at 633; see also *United States v. Bennett* (9th Cir. 1971) 445 F.2d 638, 641, cert den. 404 U.S. 1023, 30 L.Ed.2d 673;

The trial court, on the other hand, erroneously construed the standard to be applied as follows:

"If systematic jury discrimination exists, it is immaterial whether it is intentional or unintentional."

Order at page 16, lines 31-32.

That the standard is erroneous is obvious. If "discrimination" were construed to connote intention or purposeful act, then the remainder of the sentence is meaningless. Moreover, the trial judge concluded that:

"There is no contention that the Superior Court ever intentionally maintained the registration list as an exclusive means of selecting jurors for the purpose of diluting representation of the group or groups of people to which the defendants belong."

Order at page 3, lines 6-10.

Under federal case law such a standard is erroneous and cannot result in shifting the burden to the

Government to justify any statistical discrepancies in the composition of the jury panel. Since this erroneous standard was at the heart of the trial judge's Order, it was properly ordered vacated by the Court of Appeal.

IV

THE POOR ARE NOT A COGNIZABLE GROUP SYSTEMATICALLY EXCLUDED FROM JURY SERVICE

Certainly not all poor or minorities are excluded from jury service by use of voter registration lists, since statistics show that the heavily poor and minority Central District has voter registration almost identically proportionate with its population as compared with the County as a whole.[2] Once a person is on the voter registration list, there is no claim that other than random selection is followed, in which all persons, rich and poor, are treated the same by the impersonal computer.

Further, no fee is charged for voter registration. Election Code Section 219. On the contrary deputy registrars of voters are paid for each name they register. Consequently, the "poor" here are not a class defined by the effect of the law, *i.e.*, those who cannot afford to pay the fee and are thereby excluded from a right or privilege. The trial judge viewed the "poor" instead as a class in the abstract, for all purposes. No authority supports this novel proposition.

[2] 20% of County's population. *Bradley* v. *Judges* (C.D. Cal. 1974) 372 F.Supp. 26, 29 and 22% of County's registered voters, *Adams* v. *Superior Court* (2d Dist. 1972) 27 Cal.App.3d 719, 725, 727.

All persons may seek excusal from jury service for statutory reasons. Code of Civil Procedure Section 200 and 202. As noted 75% of those initially selected from the voter registration lists fail to respond or are excused.[3] The only other persons excluded from jury service are those persons, whether rich or poor or minority or white, who are not on the voter registration list. The Court of Appeals has held that persons who fail to register to vote cannot be viewed as a cognizable group.

> "The Court and others have held that those who do not choose to register to vote cannot be considered a 'cognizable group.' Grimes v. United States, *supra;* United States v. Caci, 2 Cir., 1968, 401 F.2d 664, 671; United States v. Kelly, 2 Cir., 1965, 349 F.2d 720, 778, cert. denied, 384 U.S. 947, 86 S.Ct. 1467, 16 L.Ed.2d 544; Gorin v. United States, 1 Cir., 1963, 313 F.2d 641, 644, cert. denied, 374 U.S. 829, 83 S.Ct. 1870, 10 L.Ed2d 1052. The fact that some persons may from religious conscience or otherwise choose not to register or vote does not, in our view, convert that subclass of non-voters into a 'cognizable group.' "
>
> *Camp v. United States* (5th Cir. 1969) 413 F.2d 419, 421, cert. den. 396 U.S. 968.

Even if there were a cognizable class of the non-resgistered poor, the class is not systematically and intentionally excluded from jury service, since all

[3]The Order did not consider the composition of those excused. Order, p. 4.

class members are free to register. The Ninth Circuit disposed of a similar claim with respect to young persons as follows:

> "First, Ross argues that the Plan's use of voter registration lists as the exclusive source of names of potential jurors is in violation of 28 U.S.C. § 1863 (b)(2). This is so, he says because young people are less politically active than their elders and hence less likely to register to vote. This argument is without merit. The Act and its legislative history clearly contemplate that the use of sources other than voter lists will be the exception rather than the rule. 28 U.S.C. § 1863(b)(2); 1968 U.S. Code Cong. & Admin.News, pp. 1793-95. Ross has not alleged that the right of young persons to register to vote has been inhibited in any way. Under such circumstances, exclusive reliance upon voter lists did not violate the Act. United States v. Bennett, 9 Cir., 1971, 445 F.2d 638, 641; Camp v. United States, 5 Cir., 1969, 413 F.2d 419, 421."
>
> *United States v. Ross* (9th Cir. 1972) 468 F.2d 1213, 1216 (footnote omitted), cert. den. 410 U.S. 989.

It is clear then that the poor are not a cognizable group and, in any event, are neither systematically nor intentionally excluded from jury service in Los Angeles County.

V

NO FEDERAL QUESTION IS PRESENTED BY THE ISSUANCE OF THE PEREMPTORY WRIT OF MANDATE BY THE CALIFORNIA COURT OF APPEAL

Petitioners apparently perceive a due process requirement for a hearing in an appellate court prior to the issuance of a writ to an inferior court. California law has no such requirement. Code of Civil Procedure Section 1088 provides in relevant part that:

> ". . .[I]f the application [for a writ] is upon due notice and the writ is allowed, the peremptory may be issued in the first instance. . . . The notice of the application, when given, must be at least ten days."

In this case the petition for writ was filed and served on the petitioners on November 8, 1974 and the peremptory writ was not issued until November 26, 1974. Petitioners thus had notice and eighteen days in which to file any opposition they chose. The Court of Appeal had before it at the time of its summary decision: the petition, the trial court's twenty-eight page opinion, an argumentative six page request for an extension of time filed by real parties in interest, and several volumes of trial transcripts submitted by both sides. Moreover, the trial court and the real parties in interest filed extensive arguments in their petitions for rehearing. In denying those petitions the Court of Ap-

peal must be presumed to have considered the arguments presented.

The California courts had recently upheld the validity of the same jury panel chosen solely from voter registration lists. *People* v. *Sirhan* (1972) 7 Cal.3d 710, *People* v. *Powell* (2d Dist. 1974) 40 Cal.App.3d 107, *Adams* v. *Superior Court* (2d Dist. 1972) 27 Cal.App. 3d 719. The United States Supreme Court had upheld a similar panel. *Hamling* v. *United States* (1974) ..... U.S. ....., 41 L.Ed.2d 590. No hearing was therefore necessary or useful.

Petitioners herein, the real parties in interest in the California writ proceeding, can, of course, raise the issue of the validity of the jury panel in the appeal from any conviction in their criminal trials.

In short, there is no right to a *hearing* before an appellate court can issue a pre-trial writ upon noticed motion.

VI

CONCLUSION

Since there was not any intentional or systematic exclusion of any cognizable group from the jury panel by the sole use of the voter registration list, the California Court of Appeal violated no federal standard in ordering the trial judge to vacate his order quashing the jury panel.

The single judge in this case exceeded his jurisdiction and ignored binding precedent of the higher Cali-

fornia courts in ordering the jury commissioner to provide a jury panel different from that certified by a majority of the judges and contrary to a local rule adopted by a majority of the judges.

The trial judge erred in believing that a mere de facto under-representation of the poor, if such existed, violated constitutional standards in the absence of purposeful or intentional discrimination.

Moreover, there was notice and an opportunity to file opposition before the peremptory writ was issued and there is no federally protected right to a hearing before a State Court of Appeal issues a writ.

For these reasons, the petition for writ of certiorari should be denied.

Dated: May 15, 1975

Respectfully submitted,

JOHN H. LARSON,
County Counsel

JOHN P. FARRELL,
Deputy County Counsel
Attorneys for Respondents
PRESIDING JUDGE and
JURY COMMISSIONER